PATENT APPLICATION

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In Re Application of:		Craig Allan Dunk
Application No.	:	10/787,201
Filed	:	February 27, 2004
Title	:	SYSTEM AND METHOD FOR DELIVERY OF PACKETS
TC/A.U.	:	2616
Examiner	:	HAILU, KIBROM T.
Docket No.	:	P1646US00
Customer No.	:	63617
Confirmation No.	:	4692

Mail Stop **Amendment**
Commissioner for Patents
P.O. Box 1450,
Alexandria, VA 22313-1450

PRE-APPEAL BRIEF REQUEST FOR REVIEW

Sir:

Applicant requests review of the final rejection of December 20, 2007 in the above-identified application. Applicant relies on the amendments filed in the reply-after-final filed February 19, 2008 ("Reply-after-final"). No amendments are being filed with this request. This request is being filed with a Notice of Appeal. The review is requested for the reasons on the attached pages 2-5.

PRE-APPEAL BRIEF REQUEST FOR REVIEW

Reconsideration and allowance of the subject application are respectfully requested. Claims 1-38 are pending in the application. Claims 1, 10, and 16 are independent.

Claim 16 was finally rejected under 35 U.S.C. 101 for directing to non-statutory subject matter. Claims 24-26 and 34-37 were finally rejected under 35 U.S.C. 112, first paragraph as failing to comply with the written description requirement. Claims 1, 5 and 16 were rejected under 35 U.S.C. 112 as being indefinite (See the final office action's section 7). These formal objections were addressed by way of amendments submitted in the Reply-after-Final. To any extent these formal objections were not implicitly accepted by the Advisory Action mailed March 18, 2008, Applicant reiterates its comments in the Reply-after-Final.

Claims 1, 3, 10, 16-23, 28-33 stand rejected under 35 U.S.C 103(a) as being unpatentable over Zombek et al. (US 6,704,768, "Zombek"), in view of Meyer et al. (US 7,203, 167, "Meyer") and further in view of Reidel at al. (US 7, 289, 453) and Stephens (US 2004/0258039, "Stephens").

The basis for this pre-appeal brief is that: various limitations are not met by the reference and the examiner failed to show proper motivation for making a modification in an obviousness rejection (35 U.S.C. 103). Applicant relies on its submissions in the Reply-After-Final and provides the following succinct summary of same.

Zombek is mainly directed at coupling of servers and does not teach means of addressing transmission should the QoS fail to meet certain level.

Contrary to the final office action's assertion Meyer, does not teach transmitting until a transmitting step fails: Meyer teaches continuing to transmit, even after transmission fails. Meyer does not even address QoS issues.

Riedel does not consider retransmission of data: it reacts to change in QoS demand by changing paths to restore a "lost" connection.

Stephens allocates transmit opportunity based on a detected channel condition but, detected channel condition is generally directed to information available at the layer over which the transmission occurs.

In contrast, the present independent claim 1 recites: "A method of delivering packets over a link comprising the step of: transmitting at least one packet over said link via a first layer of a protocol stack employed by said link; repeating said transmitting step until said transmitting step fails; determining a quality of said link at said an electronic device by examining quality-of-service (QoS) information inherently available within a second layer of said protocol stack; said second layer being a different layer in said protocol stack than said first layer; developing a retry strategy for said transmitting step based on said determined quality; and, retransmitting said at least one packet according to said retry strategy."

As discussed above, Meyer contemplates repeating a transmitting step WHEN (not UNTIL) the transmitting step fails. Thus, the prior does not satisfy "repeating said transmission UNTIL said transmitting step fails".

The Supreme Court in KSR noted that the analysis supporting a rejection under 35 U.S.C. 103 should be made explicit. The Court quoting stated that "'[R]ejections on obviousness cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness' KSR ... Exemplary rationales that may support a conclusion of obviousness include (A) ... (B) ... (C) ... (D) ... (E) ... (F) ... (G) ..." (MPEP 2141 (III))

In the Advisory action the Examiner asserts that motivations were provided as follows: "The Examiner also provided the following motivation(s) in the previous Office Action: "in order to ensure reliability of data, to manage the QoS, and to avoid latency". Applicant respectfully submits that these are mere conclusory statements and do not provide the requisite rational underpinning.

The final office action, in fact, demonstrates how such explicit analysis is impossible, by asserting that Riedel teaches "determining a quality of said link at an electronic device by examining quality-of-service (QoS) information inherently available within a second layer of said protocol stack; said second layer being a different layer in said protocol stack than said first layer" and that Stephens teaches: "developing a retry strategy for said transmitting step based on said determined quality; and, retransmitting said at least one packet according to said retry strategy". Riedel teaches monitoring the QoS situation at a data link layer only in preparation for a handoff scenario to reserved QoS on a new communication path to restore lost connections. Stephens teaches allocating a second portion of a transmit opportunity for retries based on past performance of the channel over which data is transmitted. That is, any retry strategy has already been established (i.e. retransmit during the second portion), and only the proportion of the transmission opportunity needs to be established. The proportion is based on a previous quality of a first layer rather than a QoS of "said determined quality" of a second layer (i.e. as in Riedel).

The final office action's assertion on Stephens is classic hindsight reconstruction. Since the "determined quality" in Stephens and Riedel are unrelated, only with the benefit of viewing the present application and claims would one be able to assert that the "SAID determined quality" in Stephens somehow encompasses the "determined quality" from Riedel. Since it is impossible, and the final office action fails, to demonstrate that "SAID determined quality" in Stephens encompasses the "determined quality", the element of "developing a retry strategy for said transmitting step based on SAID determined quality" is not satisfied by the prior art.

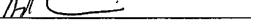
The final office action, in fact, demonstrates that there can be no motivation to combine Stephens and Riedel. Riedel is directed at monitoring QoS to make QoS reservations prepare for future handoffs, while Stephens is directed at allocation of resources for retransmission of data over the same

transmission layer. Since Riedel does not teach retransmission of data, there is no motivation for a person of skill in the art to combine Stephens and Riedel. Further, a person of skill in the art would not be lead to develop a retry strategy for a transmitting step of Stephens based on the quality of the data link layer of Riedel without substantial hindsight analysis in light of the present application.

As the independent claims are deemed allowable so too are the dependent claims now deemed allowable. For at least the foregoing reasons Applicant traverses all prior art objections in the final office action. In view of the above, it is believed that this application is now in condition for allowance, and a Notice thereof is respectfully requested.

Applicant's undersigned agent may be reached at 416-920-8170 x 109. All correspondence should continue to be directed to our address below.

Respectfully submitted,



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Date: April 17, 2008

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